MUHAMMAD SAIFUL AZLAN SABELI A

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING B
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: 42-30-2007-III(II)]
27 NOVEMBER 2008

CRIMINAL PROCEDURE: *Defence - Burden of proof - Finding that 'accused had failed to cast any reasonable doubt' - Whether in consonance with established principles - Whether requiring accused to prove his innocence - Consideration of PP v. Mohd Radzi Abu Bakar and Mat v. PP* C

This was an appeal by the appellant against the decision of the learned Sessions Court judge ('trial judge') convicting him of an offence of culpable homicide not amounting to murder (under s. 304 Penal Code), coupled with a cross appeal by the Public Prosecutor against the inadequacy of the 5-year-imprisonment term imposed thereon. The facts showed that the learned trial judge had initially acquitted and discharged the appellant, but, upon a subsequent direction by Skinner J, had called for the appellant's defence and re-deliberated on the issues of: (i) what transpired just before the deceased was stabbed; (ii) the circumstances which caused the appellant to stab the deceased; (iii) whether there were facts which inferred that the appellant had reasonably apprehended danger to his life; and if so (iv) whether the appellant had inflicted no more harm than was necessary for the purpose of self defence. In the end, it was the trial judge's finding that "the accused had failed to cast any reasonable doubt on the prosecution's case that he was the person who inflicted the fatal wound", and on that basis had convicted the appellant and sentenced him as above. Before the learned High Court judge herein, the appellant invoked *Hamzah Najdi v. PP* arguing that the trial judge had erred in law in requiring the appellant to explain on how the victim came to be stabbed. It was the appellant's stance that the trial judge, by such gesture, had required the appellant to prove his innocence. D E F G H

Held (dismissing appeal and cross appeal):

(1) I agree with the trial judge's finding that there was no explanation by the appellant in respect of the said four matters and that his testimony that he did not stab the deceased amounted only to a bare denial. One must also not forget that Skinner J in the appeal had found as a fact that it was the appellant who inflicted the fatal I

A stab on the deceased and that the appellant would have been convicted if he had remained silent (*PP v. Mohd Radzi Abu Bakar*). (paras 8 & 9)

(2) The appellant in this case had decided to give a sworn statement and what the trial judge did (in fact she had no other option) is to B determine the veracity of that statement and whether that statement had raised a reasonable doubt in the prosecution's case. The steps taken by the trial judge religiously followed the steps as laid down in *Mohd Radzi* case as well as by Suffian J in *Mat v. PP*. (paras 10 - 12)

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(3) Invariably, when one applies the test as set out in *Mohd Radzi*, the court will at the end of the prosecution's case have to come to a conclusion that the offence has been established beyond reasonable doubt. Hence for an accused to obtain an acquittal, the defence D must raise a reasonable doubt on the prosecution's case as pronounced by Suffian J. This was what the trial judge did in this case by asking the question whether the accused had given an explanation which would cast a reasonable doubt in the prosecution's case. This is not the same as saying that the burden is on the appellant to prove his innocence. The burden on the prosecution to E prove its case beyond reasonable doubt remains until the end of the defence case. (para 12)

(4) The trial judge, in passing sentence, had taken into consideration the fact that the appellant was attacked and the evidence overwhelmingly F showed that he was the victim and the deceased was the perpetrator of the attack on the appellant and his friend. The DPP had not shown where the trial judge had gone wrong in this respect. (para 16)

G ***Obiter:***

(1) The courts should refrain from using phrases like 'failed to cast', 'failed to explain most of the incriminating evidence' or 'failed in his duty to cast' in their judgments. This in my view would not give an impression that the accused, when defence is called, is required H to prove his or her innocence. As rightly pointed out by Linton Albert J in *Hamzah Najdi*, a misdirection as to the burden and standard of proof is incapable of being cured by s. 422 of the Criminal Procedure Code. (para 13)

I **Case(s) referred to:**

Hamzah Najdi v. PP [2007] 7 CLJ 437 HC ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Chung Chung Kiang & Ors [2008] 1 LNS 400 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422

For the accused - Detta Samen; M/s Detta Samen & Co Advocates
For the prosecution - Steve Ritikos; DPP

Reported by Wan Sharif Wan Ahmad

JUDGMENT

David Wong Dak Wah J:

Introduction

[1] This is an appeal against the decision of the learned Sessions Court judge in convicting the appellant/respondent (accused) for an offence of culpable homicide not amounting to murder for the death of one Zemat bin Eden (deceased). The accused was sentenced to five years' imprisonment and the public prosecutor has cross appealed against the inadequacy of sentence. I had on 14 March 2008 dismissed the appeal and cross appeal and since there is an appeal against my decision, I now give my reasons for my decision.

Background Of Case

[2] The learned Sessions Court judge at the end of the prosecution's case found that the prosecution had failed to establish a *prima facie* case and hence discharged and acquitted the accused. The prosecution appealed against that decision to the High Court which allowed the appeal and ordered the case to be remitted back to the learned Sessions Court judge for her to call the accused to enter his defence on the ground that the prosecution had established a *prima facie* case based on the evidence adduced.

Prosecution's Evidence

[3] The accused and a friend called Liew Yew Chung (PW9) were at a pub called Catcity Pub at about 8 - 9pm on 11 November 2005 having a drink and stayed there until 1am the following day. As they were leaving the place they were attacked by a group of 10 to 20 persons resulting in a fight which was witnessed by one Fareed Farduaz Khan (PW10) who knew both the accused and the deceased. PW10 testified that the deceased attacked the accused and PW9 with a chair, while the others in the group were throwing chairs or things of similar nature at each other. The people involved in the fight dispersed when

A the police arrived. The deceased was found lying at the roadside and succumbed to the injury from the fight. PW9 also testified that after the fight the accused told him that he had stabbed the deceased with a small knife during the fight which he threw into a nearby pond. However the knife was never recovered by the police despite a search at the nearby
B pond. The police found a bent fork at the scene of the crime where the deceased's body was found. It is also the prosecution's evidence that the accused spoke to one Abang Salfian Bin Abang Nawawi (PW4) who is a reporter in a local English newspaper about the fight. In that conversation the accused told PW4 that he was helping a friend in that
C fight and whilst being beaten on the ground, he grabbed an object and used it to hit the nearest attacker to save his own life. The accused also told PW4 that he did not know what that object was. PW4 reported that conversation in the local newspaper.

Effect Of High Court's Decision

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[4] As stated earlier, the decision of the learned Sessions Court judge to discharge and acquit was overruled on appeal to the High Court. In my view the effect of the High Court's decision was that the prosecution had established that it was the accused who had inflicted the
E fatal stab to the deceased and the defence was called by the learned High Court judge to allow the Sessions Court judge to determine the following:

1. What transpired just before the deceased was stabbed?

F 2. The circumstances which caused the accused to stab the deceased.

3. Whether there were facts which inferred that the accused had reasonably apprehended danger to his life?

4. And if so whether the accused had inflicted no more harm than was
G necessary for the purpose of self defence.

[5] The learned Sessions Court judge in hearing the defence was fully aware of the learned High Court judge's direction and at the end of the defence's case, found the accused guilty as charged and in doing so she said:

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> ... I find that the accused has failed to cast any reasonable doubt on the prosecution's case that he was the person who inflicted the fatal wound which led to the untimely death of the victim, Zemat ...

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Contention Of Counsel For The Accused

[6] Learned counsel for the accused, Mr. Detta Samen has latched on what the learned Sessions Court judge said and submitted that she had erred in law in requiring the accused to explain how the victim was stabbed. Counsel relied on the case of *Hamzah Najdi v. Public Prosecutor* [2007] 7 CLJ 437 where the learned High Court judge Linton Albert J said:

> The requirement imposed by the learned Sessions Court Judge on the Appellant and the second accused to explain the incriminating evidence adduced by the prosecution is a travesty of justice which goes to the very foundation of our criminal justice system and the fact that the learned Sessions Court Judge went to conclude that they failed to cast reasonable doubt on the prosecution evidence does not cure the injustice caused by that misdirection.

[7] I have no doubt that what the learned High Court judge said is a correct principle of law. The question which arises here is whether the learned Sessions Court judge had departed from that established principle of law. This was what she said in her judgment:

> In ordering me to call for defence, YA Justice Skinner has clearly defined my task when His Lordship said:
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> > The issue before the Court in the defence case is to determine what transpired just before Zemat (deceased) stabbing and the circumstances in which the accused came to stab the deceased so as to enable the accused to say that he stabbed Zemat to save his own life or body that in doing so, he inflicted no more harm than was necessary for the purpose of self-defence.

[8] Having heard the evidence from the defence, she had no hesitation in concluding that there was no such evidence. Having gone through the evidence of the accused with care myself, I agree with her findings as there was no explanation by the accused in respect of the four matters mentioned earlier. What the accused said in his evidence was that he did not stab the deceased and as such the learned Sessions Court judge had no choice but to say that the defence was a bare denial.

[9] To recap, one must not forget that the learned High Court judge in the appeal had found as a fact that it was the accused who inflicted the fatal stab on the deceased and the accused would have been convicted if he had remained silent. (See *Public Prosecutor v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457) (*Mohd Radzi* case). What that meant, in my view, was that the prosecution had at the end of the prosecution's case proved its case beyond reasonable doubt. (See *Public Prosecutor v.*

A *Chung Chung Kiang & 5 Others* [2008] 1 LNS 400 where I had found that the phrase '*prima facie*' meant 'beyond reasonable doubt' and my reason for my view was and still is that when a court is ready to convict if the accused remains silent, it can only do so if the prosecution had proven its case beyond reasonable doubt.)

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[10] The accused in this case decided to give a sworn statement and what the learned Sessions Court judge did and in fact had no other option but to determine the veracity of that statement and whether that statement had raised a reasonable doubt in the prosecution's case. The steps required to be taken by her are clearly stated by the Federal Court in *Mohd Radzi* case *(supra)* and they are these:

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(i) At the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favorable to the accused;

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(ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a *prima facie* case has not been made out and the accused should be acquitted;

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(iii) After the defence is called, the accused elects to remain silent, then convict;

(iv) After defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263

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[11] In *Mat v. Public Prosecutor (supra)* Suffian J (as he then was) set out the following steps:

The position may be conveniently stated as follows:

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(a) If you are satisfied beyond reasonable doubt as to the accused's guilt	Convict
(b) If you accept or believe the accused's explanation	Acquit

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(c) If you do not accept or believe the accused's explanation	Do not convict but consider the next step below

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt — Convict

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt — Acquit

[12] For the purpose of this appeal, Suffian J's guidance is relevant. Having read the judgment of the learned Sessions Court judge it is my view that she had religiously followed the steps and applied steps (c), (d) and (e). Does that mean she had misunderstood the principle of law stated by Linton Albert J? I must however confess that since the decision of *Mohd Radzi* case, the courts have framed their approach in such a manner that legitimate questions have been asked as to whether the just mentioned principle of law has been diluted. Invariably when one applies the test set out in *Mohd Radzi* case, the court will at the end of the prosecution's case have to come to a conclusion that the offence has been established beyond reasonable doubt for reasons stated earlier. Hence for the accused to obtain an acquittal, the defence must raise a reasonable doubt on the prosecution's case as pronounced by Suffian J. This was what the learned Sessions Court judge did in this case by asking the question whether the accused had given an explanation which would cast a reasonable doubt in the prosecution's case. Does that mean that the burden on the prosecution to prove its case beyond reasonable doubt in a criminal case is no longer law? My answer to that question would be in the negative. What *Mohd Radzi* case has done in my view is that it has forced the courts to ask at the end of the prosecution's case whether the prosecution has proven its case beyond reasonable doubt and if it has then the defence must be called. That question in my view must again be asked at the end of the defence case and in answering that question the court will evaluate the defence's evidence in light of the evidence of the prosecution as to whether it has raised a reasonable doubt on the prosecution's case. That is not the same as saying that the burden is on the accused to prove his innocence. The burden on the prosecution to prove its case beyond reasonable doubt remains until the end of the defence case. It may well be the use of the words 'failed to cast' have given the impression that the accused has a burden to explain his innocence. There is in fact no burden of proof on the accused as understood in the natural sense of the word. What is required of the accused is to give his side of the story and if that story together with the prosecution's evidence (which I call the totality of the

A evidence in the case) does not reach the level of a 'case proved beyond reasonable doubt' then the court must acquit. Conversely if the totality of the evidence amounts to a 'case proved beyond reasonable doubt' then the court must convict.

B **[13]** Reverting back to the learned Sessions Court judge's decision, for reasons stated I could not fault her as she had done what is required in *Mohd Radzi* case. In future courts should refrain from using phrases like 'failed to cast' 'failed to explain most of the incriminating evidence' or failed in his duty to cast' in their judgments. This in my view would not give an impression that the accused, when defence is called, is
C required to prove his or her innocence. As rightly pointed out by Linton Albert J in *Hamzah Najdi v. Public Prosecutor (supra)*, a misdirection as to the burden and standard of proof is incapable of being cured by s. 422 of the Criminal Procedure Code.

D **[14]** Accordingly I rejected the counsel's contention to be without merit.

Cross Appeal By The Public Prosecutor

[15] As to the appeal against the inadequacy of sentence by the public
E prosecutor, the law in respect of an appeal of such nature is set out by Wan Yahya J in *New Tuck Shen v. Public Prosecutor* [1982] CLJ 38; [1982] CLJ (Rep) 606 where he said:

> It is an established principle of our criminal law that an appellate court will not alter the sentences of the trial court unless the sentences are
F manifestly wrong and that such sentence should not be interfered with merely because the High Court might pass a different sentence - see *Public Prosecutor v. Fam Kim Hock* and *Rex v. Teo Cheng Lian*

[16] The burden is on the prosecution to show to the court where the
G learned Sessions Court judge had gone wrong. Having read the submission made by the learned DPP, I found that the DPP had not discharged that burden. The learned Sessions Court judge in passing her sentence had taken into consideration (which I am also of the view was very relevant) the fact that the accused was attacked and the evidence overwhelmingly showed that he was the victim and the deceased was
H the perpetrator of the attack on the accused and his friend.

Conclusion

[17] Accordingly I dismissed the appeal of the accused against his conviction and the cross appeal of the Public Prosecutor in respect of
I the sentence passed.